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No. 02-915

In the

Supreme Court of the United States

ROBERT R. KRILICH, KRILICH COMPANIES, INC., RIVERWOODS DEVELOPMENT CORP., ET AL.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in holding, contrary to decisions of other courts of appeals and this Court's decision in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers* that the federal government has the statutory and constitutional authority to regulate "non-navigable, isolated wetlands that have no surface connection to the nearest stream or nearest navigable body of water."

2. Whether a consent decree between private citizens and an agency of the federal government is subject to rescission as void ab initio where the federal government never had statutory or constitutional authority to regulate the subject matter of the decree.

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IDENTITY AND INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37.2, Pacific Legal Foundation respectfully submits this brief amicus curiae in support of the Petition for Writ of Certiorari.[1] Written consent was granted by counsel for all parties and lodged with the Clerk of this Court.

Pacific Legal Foundation is a nonprofit, tax-exempt organization incorporated to litigate important matters of public interest. PLF has thousands of supporters nationwide and advocates a balanced approach to dealing with public interest issues. PLF supports the concept of limited government and the "rule-of-law" and believes the environment must be protected consistent with economic and other needs of society. PLF's Board of Trustees has authorized amicus participation in this case.

PLF has participated as amicus curiae in numerous cases involving interpretation of the Clean Water Act (CWA). For example, PLF participated as amicus curiae in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001); *Hanousek v. United States*, 528 U.S. 1102 (2000); *Friends of the Earth, Inc. v. Laidlaw Environmental Services*, 528 U.S. 167 (2000); and *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985). PLF is familiar with the issues in this case and believes its briefing on those issues will add a necessary viewpoint to the questions presented.

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[1] Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

STATEMENT OF THE CASE

In 1992, Robert Krilich was sued by the Environmental Protection Agency (EPA) for filling wetlands without a permit—a Clean Water Act violation. While the suit was pending, the Seventh Circuit decided *Hoffman Homes, Inc. v. Administrator, United States Environmental Protection Agency*, 961 F.2d 1310 (7th Cir.) ("*Hoffman Homes I*"), *vacated*, 975 F.2d 1554 (7th Cir. 1992), in which the court determined that EPA had no authority under the Clean Water Act to regulate "isolated" wetlands, or wetlands that have no connection to open waters. After that decision, Krilich and EPA entered into a consent decree disposing of their case. They agreed, in accordance with *Hoffman Homes I*, that certain wetlands on Krilich's Illinois property were not subject to regulation but that Krilich would need to mitigate the impacts of filling other wetlands on his property that were remote from open waters. These wetlands had "no natural connection to any navigable waterway" and were "located 19.1 stream miles away from the nearest navigable body of water." Petition at 3.

In 2001, this Court decided *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (*SWANCC*). In that case, this Court determined that the EPA and the Corps have no statutory authority under the Clean Water Act to regulate nonadjacent wetlands, or wetlands that do not abut a navigable waterway. *See Id.* at 168. It did so by invalidating an administrative policy, called the "Migratory Bird Rule," that purported to authorize these agencies to regulate fill into any waters that could be used by migratory birds. Subsequently, Krilich challenged the consent decree arguing it was void because it required him to mitigate for impacts to nonadjacent wetlands over which this Court had determined the government had no authority. However, the Seventh Circuit refused to rescind the consent decree because it believed *SWANCC* only invalidated the "Migratory Bird Rule" and did not limit the agencies' ability

to regulate nonadjacent wetlands. *United States v. Krilich*, 303 F.3d 784, 791 (7th Cir. 2002).

SUMMARY OF THE ARGUMENT

The Petition for Writ of Certiorari should be granted because the lower court misinterpreted the CWA and upheld the EPA's assertion of authority over nonnavigable, intrastate wetlands that are not immediately adjacent to a navigable waterway. That decision is contrary to *SWANCC* wherein this Court determined that the CWA does not authorize federal regulation of wetlands or other waters that are not navigable or that do not abut a navigable water body. Additionally, federal regulation of nonadjacent wetlands suffers from the same constitutional defects as the "Migratory Bird Rule" invalidated in *SWANCC*. But the Government itself provides one of the most persuasive arguments in support of review. The government acknowledges that many lower courts have rejected its narrow reading of *SWANCC*, adopted by the Seventh Circuit in this case. Nevertheless, the government is seeking public input on its CWA jurisdiction based on that reading.

ARGUMENT

I

THE PETITION SHOULD BE GRANTED BECAUSE THE COURT BELOW HAS MISINTERPRETED THE CLEAN WATER ACT ON AN IMPORTANT QUESTION OF FEDERAL LAW THAT CARRIES SIGNIFICANT CONSTITUTIONAL IMPLICATIONS

A. The Lower Court Decision Raises Serious Federalism Questions

The decision below raises a red flag; federal intrusion into state affairs. According to this Court, the concern raised by pushing the envelope on federal authority is heightened "where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power." *SWANCC*, 531 U.S. at 173. Simply stated, this Court has recognized that permitting the EPA and the Corps to claim federal jurisdiction over ponds and mudflats "would result in a significant impingement of the States' traditional and primary power over land and water use." *Id.* at 174.

This is not a matter of speculation. Reports of heavy-handed enforcement of section 404 of the CWA are legion. *See, e.g., National Mining Association v. United States Army Corps of Engineers*, 145 F.3d 1399 (D.C. Cir. 1998), and *United States v. Wilson*, 133 F.3d 251 (4th Cir. 1997). By means of the section 404 permit process, the federal government assumes actual veto power over literally tens of thousands of land use projects nationwide every year, thereby usurping the traditional powers of state and local governments. A more significant shift in the federal-state framework would be hard to conceive. By one measure, 75% of the approximately 100,000,000 acres of the nation's wetlands are on private land subject to state and local control. *See*

Jonathan H. Adler, *Wetlands, Waterfowl, and the Menace of Mr. Wilson: Commerce Clause Jurisprudence and the Limits of Federal Wetland Regulation*, 29 Envtl. L. 1, 26, 52 (1999). Clearly, the Seventh Circuit decision in this case raises serious concerns about federal intrusion into state affairs. If the EPA and the Corps can regulate any wetland, no matter how attenuated or remote the connection to navigable waters, the States will have lost their sovereign power. This cannot be the law.

This Court has recognized that the Constitution established a federal government of enumerated powers which are few and defined in contrast to the powers of the States which are numerous and indefinite. *See United States v. Lopez*, 514 U.S. 549, 552 (1995). This limitation on federal authority was necessary, this Court has emphasized, to ensure our fundamental liberties and protect the nation against unfettered federal power and a "completely centralized government." *Id.* at 552-55. It follows that the government cannot shift this balance of power by the simple expedient of asserting authority over nonadjacent, nonnavigable, intrastate waters like those at issue here.

An explicit objective of Congress in promulgating the CWA was to "recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources." 33 U.S.C. § 1251(b). But the regulation of nonadjacent waters at issue in *SWANCC* was inconsistent with that objective. So is the regulation of nonadjacent wetlands in this case. The ability of the EPA and the Corps to condition or prohibit the filling of nonnavigable, intrastate wetlands that do not abut a navigable water cannot coexist with the State's "primary responsibilities and rights . . . to plan the development and use . . . of land and water resources." *Id.* The regulation of such waters does not "recognize, preserve, and protect" the power of the States. Rather, it diminishes that power.

B. The Lower Court Decision Conflicts with This Court's SWANCC Decision

Until the *SWANCC* decision, many courts and the federal government relied on *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), to justify EPA and Corps regulation of virtually all wetlands without regard to their connection to "navigable waters." Even now, these agencies doggedly assert that *SWANCC* had a negligible effect on *Riverside Bayview* and that its wetland jurisdiction has not been altered beyond invalidation of the "Migratory Bird Rule." But this is based on a misunderstanding of both cases.

Riverside Bayview Homes, Inc., owned 80 acres of low-lying marshland near the shores of Lake St. Clair in Macomb County, Michigan. When Riverside Bayview placed fill material on the property without a permit, the Corps asserted jurisdiction over the property as an "adjacent wetland" and obtained an injunction from the district court. That court found that the marshland was "adjacent" to a navigable water because the area was characterized by saturated soil conditions and wetland vegetation that "extended . . . to Black Creek, a navigable waterway." *Riverside Bayview*, 474 U.S. at 131.

That side-by-side connection between the marshland and the open water body formed the basis for this Court's decision in *Riverside Bayview*. This Court expressly held that Riverside Bayview must obtain a permit "*[b]ecause* respondent's property is part of a wetland that *actually abuts* on a navigable waterway." *Id.* at 135 (emphasis added). But notwithstanding this clear holding, other language in *Riverside Bayview* was interpreted by the EPA and the Corps to extend the reach of the CWA to nonnavigable waters generally.

As this Court noted: "In *Riverside Bayview Homes*, we recognized that Congress intended the phrase 'navigable waters' to include 'at least some waters that would not be deemed "navigable" under the classical understanding of that

term.'" *SWANCC*, 531 U.S. at 171 (quoting *Riverside Bayview*, 474 U.S. at 133). The EPA and the Corps evidently took that language as carte blanche and used it to justify regulation of even wholly isolated waters. But in *SWANCC*, this Court countered that interpretation by noting that the language of *Riverside Bayview* does not confer federal jurisdiction over *all* nonnavigable wetlands:

> We cannot agree that Congress' separate definitional use of the phrase "waters of the United States" constitutes a basis for reading the term "navigable waters" out of the statute. We said in *Riverside Bayview Homes* that the word "navigable" in the statute was of "limited effect" and went on to hold that § 404(a) extended to nonnavigable wetlands adjacent to open waters. But it is one thing to give a word limited effect and quite another to give it no effect whatever. The term "navigable" has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made.

Id. at 172.

This language sets forth the scope of the CWA and clearly limits *Riverside Bayview*. As noted above, in *Riverside Bayview*, this Court held that the term "navigable" was of limited effect. But in *SWANCC*, this Court declared the limits of that effect. As this language indicates, under *SWANCC*, "navigable" waters extend only (1) to wetlands adjacent to open waters, and (2) to other waters that were or had been navigable in fact or which could reasonably be so made.

Other language in *SWANCC* further limits both this Court's decision in *Riverside Bayview* and the word "adjacent." This Court stated: "In *United States v. Riverside Bayview Homes,*

Inc., we held that the Corps had § 404(a) jurisdiction over wetlands that *actually abutted* on a navigable waterway." *SWANCC*, 531 U.S. at 167 (emphasis added; citation omitted). But this Court did not stop there in its explication of *Riverside Bayview*. This Court offered additional clarification in *SWANCC* regarding the scope of agency jurisdiction over adjacent wetlands: "We found that Congress' concern for the protection of water quality and aquatic ecosystems indicated its intent to regulate wetlands 'inseparably bound up with the "waters" of the United States.'" *SWANCC*, 531 U.S. at 169 (quoting *Riverside Bayview*, 474 U.S. at 134). But, "[i]t was the significant nexus between the wetlands and 'navigable waters' that informed our reading of the CWA in *Riverside Bayview Homes*." *SWANCC*, 531 U.S. at 167.

After discussing what this Court **had** determined in *Riverside Bayview*—that the Corps (and therefore the EPA) could regulate certain wetlands that abut a "navigable waterway"—this Court pointed out what it **had not** determined in *Riverside Bayview*: "Indeed, we did not 'express any opinion' on the 'question of the authority of the Corps to regulate discharges of fill material into wetlands that are *not* adjacent to bodies of open water.'" *Id.* at 167 (emphasis added).

It follows from that statement that *Riverside Bayview* does not support the EPA and the Corps' regulation of the nonnavigable, intrastate wetlands in this case that lie more than nineteen miles from the nearest navigable waters. Nor does *SWANCC*. In *SWANCC* this Court did express an opinion on the question left open in *Riverside Bayview* and concluded: "In order to rule for respondents here, we would have to hold that the jurisdiction of the Corps extends to ponds that are *not* adjacent to open water. But we conclude that the text of the statute will not allow this." *Id.* at 168.

Therefore, jurisdictional wetlands must actually abut a navigable waterway and be inseparably bound up and have a

significant nexus with navigable waters. As a result, wetlands that are not immediately adjacent to navigable waters are not subject to federal regulation under the CWA.

The wetlands at issue in this case do not meet this standard. They do not abut any navigable waterway:

> The nearest non-navigable water body, Salt Creek, is located 1.9 stream miles away from the property, and the nearest navigable water, the Des Plaines River at Hoffman Dam, is located 19.1 stream miles away. In order for any runoff from the property to reach the Des Plaines River at Hoffman Dam, it must travel into a manhole with an open grate, which connects to a "manmade, underground, concrete storm sewer system," which runs 2000 feet east and then flows into a small ditch that joins non-navigable Salt Creek about 1.5 miles further east. Salt Creek then joins the Des Plaines River approximately 16.5 miles to the Southeast.

Petition at 1-2.

Clearly, these wetlands are not adjacent to a navigable waterway. Nor are they "inseparably bound up" with any navigable waters or have a "significant nexus" with such waters.

C. The Lower Court Decision Raises Serious Commerce Clause Questions

In *SWANCC*, the Corps argued the CWA granted it authority to regulate "nonnavigable, isolated, intrastate waters. 531 U.S. at 172. However, this Court determined that the Corps' interpretation of the statute invoked "the outer limits of Congress' power" and could not be sustained. *Id.*

Thus "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such

construction is plainly contrary to the intent of Congress." *Id.* at 173 (quoting *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building and Construction Trades Council*, 485 U.S. 568, 575 (1988)).

The constitutional problem was the Corps' claim that the filling of "nonnavigable, isolated, intrastate" waters somehow "substantially affected" interstate commerce and was, therefore, authorized under Congress' commerce power. This Court was clearly skeptical of this argument and noted that the commerce connection asserted by the Corps was "a far cry, indeed, from the 'navigable waters' and 'waters of the United States' to which the statute by its terms extends." *SWANCC*, 531 U.S. at 173. To drive the point home, this Court referenced its Commerce Clause decisions in *United States v. Morrison*, 529 U.S. 598 (2000), and *United States v. Lopez*, 514 U.S. 549, stating: "Twice in the past six years we have reaffirmed the proposition that the grant of authority to Congress under the Commerce Clause, though broad, is not unlimited." *SWANCC*, 531 U.S. at 173.

Since the regulation of nonnavigable, isolated, intrastate waters implied unlimited administrative authority in the federal government, this Court was unwilling to read such authority into the CWA. But the lower court's determination in this case that the EPA has authority over waters that are not adjacent to, or abut, a navigable waterway implies the same limitless power as the "Migratory Bird Rule" and is likewise invalid. A closer look at this Court's Commerce Clause cases makes the point.

Morrison involved a Commerce Clause challenge to 42 U.S.C. § 13981. That statute provided a federal civil remedy for the victims of gender-motivated crimes. Building on *Lopez*, this Court ruled that the statute could not be sustained under the Commerce Clause.

In *Morrison,* this Court affirmed that every law enacted by Congress must be based on a power enumerated in the

Constitution. *Morrison*, 529 U.S. at 607. Although Congress has been given wide latitude under the Commerce Clause, this Court said the modern court has recognized limits to that power. *Id.* at 608. Since 42 U.S.C. § 13981 was focused on "gender-motivated violence wherever it occurs (rather than violence directed at the instrumentalities of interstate commerce, interstate markets, or things or persons in interstate commerce)," this Court determined the proper inquiry was whether gender-motivated crime substantially affected interstate commerce. *Morrison*, 529 U.S. at 609.

This Court adopted *Lopez* as the proper framework for this inquiry and observed that central to the *Lopez* decision was the noneconomic nature of the statute. *Id.* at 610. But to emphasize the point, this Court stated:

> *Lopez's* review of Commerce Clause case law demonstrates that in those cases where we have sustained federal regulation of intrastate activity based upon the activity's substantial effects on interstate commerce, the activity in question has been some sort of economic endeavor.

Id. at 611.

This Court also observed that in *Lopez* there was no jurisdictional element establishing a case-by-case connection to interstate commerce and that the *Lopez* decision rested in part on the fact that the "link between gun possession and a substantial effect on interstate commerce was attenuated." *Id.* at 612.

With these principles underlying its Commerce Clause jurisprudence, this Court found resolution of the gender-motivated crime statute clear: "[T]hus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature." *Id.* at 613. This Court, therefore, challenged the

government's arguments that all gender-motivated crime, a noneconomic endeavor, may be combined to show a substantial effect on interstate commerce. These arguments, this Court stated, are "substantially weakened by the fact that they rely so heavily on a method of reasoning that we have already rejected [in *Lopez*] as unworkable if we are to maintain the Constitution's enumeration of powers." *Id.* at 615.

Thus, this Court held:

> We accordingly reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce. The Constitution requires a distinction between what is truly national and what is truly local.

Id. at 617-18.

The basis for this Court's recent rulings is clear: The Commerce Clause power has limits; it is not like the police power retained by the States.

For this reason, this Court has closely scrutinized Commerce Clause enactments. The framework adopted by this Court to analyze these enactments for substantial effects on interstate commerce is consistent and straightforward. In *Lopez* and *Morrison*, this Court asked: (1) if the statute purports to regulate an economic activity; (2) if the statute has a jurisdictional element establishing through case-by-case analysis a connection to interstate commerce; and (3) if the regulation intrudes on areas of traditional state concern.

Under this framework, the regulation of the filling of nonnavigable, intrastate wetlands that do not abut a navigable waterway utterly fails as a valid exercise of the Commerce Clause power. First, the filling of such waters is not inherently commercial and, like the mere possession of a gun or domestic violence, on its face has nothing to do with commerce or any

sort of economic activity. Second, the government's regulation of such waters is not based on a jurisdictional element establishing through case-by-case analysis a connection to interstate commerce. And third, the regulation of the filling of such waters intrudes on the sovereign power of the state to control local land and water use.

Aside from these considerations, this Court weighs a final factor; that is, whether the basis for the regulation has any logical stopping point. *See Lopez*, 514 U.S. at 564-67. A Commerce Clause enactment that relies on combining attenuated economic impacts and unduly expands the reach of Congress will not be sustained. *See Morrison*, 529 U.S. at 617-18. The filling of nonadjacent, nonnavigable, intrastate wetlands is a case in point.

By its own terms, the mere placement of dredged or fill material into shallow and ephemeral waters has no relation to economic activity. Nor has the government shown in this case that the filling of Krilich's wetlands had any measurable affect whatsoever on the navigable waterway lying more than nineteen miles away. To the contrary, Petitioners have provided uncontroverted evidence that the filling of wetlands on Krilich's property "would have no measurable effect" on the nearest navigable or nonnavigable water "in terms of wildlife habitat, stormwater retention, flood flow attenuation and water purification even if they were *completely* filled." Petition at 3.

If Congress can regulate under the Commerce Clause wholly intrastate activity that has nothing to do with commerce or any other economic enterprise, there would be no activity that Congress is without power to regulate.

The only way to avoid the constitutional conflicts raised by the EPA's regulation of the nonadjacent wetlands in this case, and upheld by the court below, is to limit the scope of the CWA to navigable waters, or those nonnavigable waters that are directly adjacent to, or abut, a navigable water, as this Court

sought to do in *SWANCC*. To clarify its ruling in *SWANCC*, this Court should grant the petition.

II

THE PETITION SHOULD BE GRANTED BECAUSE THE FEDERAL GOVERNMENT REFUSES TO FOLLOW THE *SWANCC* DECISION AND THERE IS A SUBSTANTIAL CONFLICT AMONG THE LOWER COURTS

Since the *SWANCC* decision, over twenty courts have considered the federal government's jurisdiction under the CWA. *See* 68 Fed. Reg. 1991, 1996-97 (Jan. 15, 2003). In these cases, the EPA and the Corps have argued that *SWANCC* merely invalidated the "Migratory Bird Rule" and does not prohibit the government from regulating nonnavigable, intrastate waters that do not abut a navigable waterway, such as the wetlands in this case. More precisely, they have argued that they have CWA jurisdiction over any water that has any surface hydrological connection to a navigable water, or even to a tributary to a navigable water. *See, e.g., United States v. RGM Corp.*, 222 F. Supp. 2d 780 (E.D. Va. 2000).

But this position directly conflicts with this Court's finding in *SWANCC* that the CWA does not extend federal authority over wetlands and other waters that are not navigable or immediately adjacent to navigable waters: "In order to rule for respondents here, we would have to hold that the jurisdiction of the Corps extends to ponds that are *not* adjacent to open water. But we conclude that the text of the statute will not allow this." *SWANCC*, 531 U.S. at 168.

This position also conflicts with several appellate and district court decisions that have construed *SWANCC*. *Rice v. Harken Exploration Company*, 250 F.3d 264 (5th Cir. 2001), is a prime example. Although *Harken* did not involve the CWA, the Fifth Circuit relied on *SWANCC* in its interpretation of the Oil Pollution Act concluding "it appears that a body of water is

subject to regulation under the CWA if the body of water is actually navigable or is adjacent to an open body of navigable water." 250 F.3d at 269. The government acknowledges that this decision implies that the Fifth Circuit "might limit CWA jurisdiction to only those tributaries that are traditionally navigable or immediately adjacent to a navigable water." 68 Fed. Reg. 1991, 1997. Some district courts that have relied on a similar analysis of *SWANCC* include *United States v. Rapanos*, 190 F. Supp. 2d 1011, 1012 (E.D. Mich. 2002) (*appeal pending*) ("the Court finds as a matter of law that the wetlands on Defendant's property were not directly adjacent to navigable waters, and therefore, the government cannot regulate Defendant's property."); *United States v. Needham*, 2002 U.S. Dist. LEXIS 23914 (W.D. La. Jan. 22, 2002) (*appeal pending*) (wetlands and tributaries that are not contiguous to navigable waters are not jurisdictional); and *United States v. RGM Corp.*, 222 F. Supp. 2d 780 (E.D. Va. 2002) (*appeal pending*) (nonadjacent wetlands are not jurisdictional).

The EPA and the Corps recognize that the lower courts have not universally supported their interpretation of *SWANCC* or the CWA upheld in this case:

> Several federal district and appellate courts have addressed the effect of *SWANCC* on CWA jurisdiction, and the case law on the precise scope of federal CWA jurisdiction in light of *SWANCC* is still developing. While a majority of cases hold that *SWANCC* applies only to waters that are isolated, intrastate and non-navigable, several courts have interpreted *SWANCC*'s reasoning to apply to waters other than the isolated waters at issue in that case.

68 Fed. Reg. 1991, 1996.

But notwithstanding that acknowledgment, on January 15, 2003, the EPA and the Corps issued an *Advance Notice of Proposed Rulemaking on the Clean Water Act Regulatory*

Definition of "Waters of the United States." 68 Fed. Reg. 1991. The purpose of that notice is purportedly to solicit public input on the "the implications of the *SWANCC* decision for jurisdictional decisions under the CWA." According to the notice, *SWANCC* merely eliminates federal CWA jurisdiction over isolated, intrastate, nonnavigable waters, "where the sole basis for asserting CWA jurisdiction is the actual or potential use of the waters as habitat for migratory birds that cross State lines in their migrations." *Id.* at 1993. As demonstrated above, this is an unduly narrow reading of the *SWANCC* decision.

The agencies do begrudgingly admit, however, that "*SWANCC* also calls into question whether CWA jurisdiction over isolated, intrastate, non-navigable waters could now be predicated on other factors listed in the "Migratory Bird Rule" or the other rationales of 33 CFR 328.3(a)(3)(i)-(iii)." 68 Fed. Reg. 1991, 1993. But the agencies go no further. They request public input on the following jurisdictional question:

> Whether, and, if so, under what circumstances, the factors listed in 33 CFR 328.3(a)(3)(i)-(iii) (i.e., use of the water by interstate or foreign travelers for recreational or other purposes, the presence of fish or shellfish that could be taken and sold in interstate commerce, the use of the water for industrial purposes by industries in interstate commerce) or any other factors provide a basis for determining CWA jurisdiction over isolated, intrastate, non-navigable waters?

68 Fed. Reg. 1991, 1994.

But this question addresses only isolated waters, or waters that have no hydrological connection to a navigable water body, whereas SWANCC addressed and terminated federal jurisdiction over wetlands or other waters that "are *not* adjacent to open water." *SWANCC*, 531 U.S. at 168.

Thus, in addition to the split among the appellate and district courts over CWA jurisdiction, the government is now seeking clarification of its authority based on an understanding of *SWANCC* that many courts have already rejected. Therefore, this Court should grant the petition for certiorari.

CONCLUSION

The wetlands on Krilich's property are more than nineteen stream miles from the nearest navigable water body and connected only by means of intermittent, manmade conveyances, including a manhole and storm sewer system. Federal regulation of such wetlands is inconsistent with the CWA and *SWANCC* and raises significant constitutional concerns. Moreover, the government acknowledges that there is a substantial conflict among the lower courts.

For these reasons, the Petition for Writ of Certiorari should be granted.

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Respectfully submitted,

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